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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~867~~ 70-26

MILLARD GOODING, Warden
of the Richmond County,
Georgia Public Works Camp,
Appellant,

v.

JOHNNY C. WILSON,
Appellee.

On Appeal from the United States Court of Appeals
for the Fifth Circuit

JURISDICTIONAL STATEMENT

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Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is at this time unreported. It is set forth in Appendix A, pp. 1a *et seq.*

The opinion of the United States District Court for the Northern District of Georgia is reported at 303 F.Supp. 952. It is set forth in Appendix B, pp. 1b *et seq.*

JURISDICTION

This suit was originally commenced in the United States District Court by a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 et seq. seeking to set aside the appellee's State-court conviction. The appellant relied upon a State statute in support of his contention that the restraint imposed by him upon the appellee's liberty was not in violation of the Constitution, treaties or laws of the United States. The District Court entered an order on July 8, 1969 in favor of the appellee and based entirely upon the District Court's determination that the State statute upon which the appellant relied was invalid as repugnant to the Constitution. The decision of the District Court was appealed to the United States Court of Appeals for the Fifth Circuit, which on August 19, 1970, entered a judgment affirming the judgment of the District Court. A notice of appeal to this Court was filed in the Court of Appeals on September 3, 1970. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether a State statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace is unconstitutional for vagueness and overbreadth.

STATUTES INVOLVED

Georgia Code § 26-1409 (1933) and Ga. Code § 26-6303 (1933) are set forth in Appendix C, p. 1c.

STATEMENT OF THE CASE

Section 26-6303 of the Code of Georgia (1933) provides that:

> "Any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence of a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, streetcars, or other places of like character, shall be guilty of a misdemeanor."

The appellee was convicted of the unprovoked use to another, in the other's presence, of opprobrious words or abusive language tending to cause a breach of the peace.

The petitioner's application set out, among other things, the following claim for relief:

> "5. Ga. Code Ann. § 26-6303, under which petitioner was convicted on counts 3 and 4 of the indictment is on its face unconstitutionally vague and overbroad in violation of the first amendment and due process clause of the fourteenth amendment, it failing to apprize persons with sufficient particularity of the conduct which is sought to be prohibited and, by its excessive breadth, prohibiting activity protected by the first amendment. . . .
>
> "6. Ga. Code Ann. § 26-6303 is unconstitutionally vague and overbroad in violation of the first amendment and due process and equal protection clauses of the fourteenth amendment as applied to petitioner in the following respects:

> (a) Neither the case law of the State of Georgia, the trial court, nor the Supreme Court of Georgia defined the words 'opprobrious words or abusive language,' thereby leaving the determination of petitioner's guilt to the discretion fo (sic) the jury without adequate asfeguards (sic) of petitioner's due process right of notice or first amendment right of freedom of speech." Petition for Writ of Habeas Corpus, pp. 2-3, Record 2-3.

The District Court construed the attack upon Ga. Code Ann. § 26-6303 a private, unofficial, copyrighted publication, as an attack upon the constitutionality of Ga. Code § 26-6303 (1933), and limited the scope of its inquiry to the facial constitutionality of this statute. (Order dated Mar. 4, 1969; Record 326-27). By order dated July 7 or 8, 1969, and entered July 8, 1969, the District Court declared the criminal statute in question to be unconstitutionally vague and overly broad. (Record 364-71).

A notice of appeal to the United States Court of Appeals was filed in the District Court on July 11, 1969, and a protective notice of appeal to this Court was filed in the District Court on July 17, 1969. This latter appeal was dismissed for want of jurisdiction on December 8, 1969. By judgment dated and entered August 19, 1970, the Court of Appeals affirmed the judgment of the District Court declaring the criminal statute in question to be unconstitutionally vague and overly broad.

THE QUESTION IS SUBSTANTIAL

1. A STATE CRIMINAL STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE TENDING TO CAUSE A BREACH OF THE PEACE IS NOT UNCONSTITUTIONAL FOR VAGUENESS OR OVERBREADTH.

The appellee, Wilson, in his application chose to launch an attack upon the constitutionality of a state statute based on alleged vagueness *and* overbreadth. While recognizing that this is now the commonly accepted mode for mounting constitutional offensives, the appellant submits that the concept of overbreadth is more properly addressed to the first-amendment protections while the concept of vagueness is a due-process consideration. Practice does not make perfect, and constitutional concepts would seem to be equally entitled to the integrity of their individual identities. This is especially true when the concepts are separately written upon the body of the Constitution by separate amendments entered at different times. Absent such a separation, sound analytical application of constitutional principles and concepts is ofttimes impossible. Unfortunately, the opinion which accompanied the order of the court below made no attempt to distinguish between the two concepts. Consequently, the matter of the alleged vagueness of the statute will necessarily have to be treated together with the alleged first-amendment deficiency. At the same time, the appellant requests the Court to consider the fact that two separate, important principles are involved.

Georgia Code § 26-6303 (1933) does not infringe

upon or restrict protected speech; that portion of the section herein involved is a simple criminal statute directly related to that body of the law which defines and punishes the offense of assault and battery. Georgia Code § 26-1409 (1933) provides as follows:

> "On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury."

The obvious design of the statutory scheme is to avoid personal violence and not to regulate public speech. A fair reading of the statute under attack indicates that it prohibits nothing more than the use of opprobrious and abusive words under circumstances which tend to cause shootings, stabbings, fisticuffs, and common affrays. It prohibits persons from engaging in conduct which constitutes a justification for a simple assault and battery. As such, it is not a political statute. Its provisions are not so broad as to prohibit or infringe upon even the most flaming political argument or debate, the object of which is to quicken the sense of the hearer and to move him to engage in a protracted expression of his own political philosophy.

The appellant recognizes that some statutes, notably those directed toward the control of political activity and advocacy, have been found to be unconstitutional where they have attempted to proscribe and make punishable the exchange of ideas and the advocacy without overt act of unlawful conduct. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). These statutes, and the cases

involving them, have been uniformly concerned with conduct which is political and which is embraced within the first amendment. Other decisions have dealt with situations where statutes have proscribed conduct broadly so as to sweep within the coverage of the statutory proscriptions conduct within the protection of the first amendment. *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964). Unfortunately, some of these decisions are accompanied by opinions couched in the language of due process and touching upon the void-for-vagueness doctrine; however, it is submitted that the thread of constitutional infirmity which links these decisions, and others of similar import, is the fact that the statute involved attempted to over-regulate protected first-amendment conduct. The question of overbreadth is truly a first-amendment question—one which can only be resolved by ascertaining the limitations of the proscription on conduct which the statute under attack sets forth and comparing this ascertained proscription with the protected areas of conduct.

The first amendment was not intended, and is not applied, to protect all speech, i.e., all verbal exercises. This is the clear, obvious teaching of the division between the Supreme Court majority and the concurring opinion writers in *Brandenburg v. Ohio*, *supra*. In fact, at the same time, there appears to be universal agreement that a major, if not the major, purpose of the first amendment is "to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214 (1966). It has been repeatedly recognized that the commitment of the first amendment is to the protection of the ex-

change of political and social ideas. Certain federal statutes which totally and absolutely prohibit speech in various forms have withstood assault launched from first-amendment bases. *Truchinski v. United States*, 393 F.2d 627 (8th Cir. 1968); *Spinelli v United States*, 382 F.2d 871 (6th Cir. 1967); *Katz v. United States*, 369 F.2d 130 (9th Cir. 1966), *rev'd other grounds*, 389 U. S. 347 (1967); *United States v. Corallo*, 281 F.Supp. 24 (S.D.N.Y. 1968); *United States v. Kelly*, 254 F.Supp. 9 (S.D.N.Y. 1966); *United States v. Borgese*, 235 F.Supp. 286 (S.D.N.Y. 1964).

This Court has proclaimed on numerous occasions that freedom of speech is concerned with political and social exchanges, and the Court has expressly held that "the central commitment of the first amendment . . . is that 'debate on public issues should be uninhibited, robust, and wide open.' " *Bond v. Floyd*, 385 U.S. 116 (1966). An identical view of the first amendment is expressed in an earlier case holding that "the first amendment envisions that persons be given the opportunity to inform the community of both sides of the issues. . . ." *Wood v. Georgia*, 370 U.S. 375 (1962). The same factor is implicit in the Court's decision in *Brandenburg v. Ohio, supra*, and the cases therein cited.

Freedom of speech is not an absolute right. *Cox v. Louisiana*, 379 U.S. 559 (1965).

> "The Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the State if there are compelling reasons to do so." *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697, 702 (5th Cir. 1968).

In declaring that obscenity is not protected by the first amendment, this Court held that:

> "The unconditional phrasing of the first amendment was not intended to protect every utterance. . . . The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 483-84 (1957).

Even the *Roth* dissenters expressed the thought that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." *Id.* at 514. Cf. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).

At this point, it seems proper to stop and examine again the Georgia statute under attack and to note, by a process of exclusion, what it does not purport to make punishable. It does not seek to punish the advocacy of an idea. *Brandenburg v. Ohio, supra.* The statute as drafted leaves one free to use abusive and opprobrious language to advocate the violent overthrow of our system of government, if that be the person's desire. It does not apply to abusive or opprobrious language utilized in the mere abstract teaching of the moral propriety or necessity for a resort to force and violence to effect political and/or social changes. It does not attempt to affect the mass dissemination of ideas by media or printed matter. A person is free, if that be his desire, to use opprobrious and abusive language in describing another person not in the presence of the person so described. The speaker may even use opprobrious and abusive language to or about another person in his presence provided, of course, that the use of the language

under the circumstances does not tend to a breach of the peace. As viewed, the statute is not designed to regulate social or political commentary and activity.

The first amendment protects the freedom of assembly; however, it does not protect assemblage which is incidental to, and a part of, a punishable conspiracy. In the present case, we are concerned with the statute which on its face does not attempt to regulate advocacy, instigation or incitation. Rather, it deals solely with face-to-face provocation. The appellant submits that the first amendment's protection of free speech was never intended to clothe a person in immunity who by use of words to and in the face of another person intentionally provokes that other person to acts of violence *against* the speaker. Such an extension of the first amendment would not be in line with ordered concepts of civilized democracy; rather, it would necessarily tend toward a disorderly, bawdy and violent social structure.

The States have a legitimate interest in prohibiting the use of abusive and opprobrious words which tend to provoke violent, immediate, physical affrays. The common need of all citizens, including those who desire to engage in peaceful expressions of their political views, to live in a society in which free and robust political debate is a meaningful concept is a compelling reason, within the meaning of the Fifth Circuit's decision in *Ferrell, supra*, for the States to restrict the use of abrasive language which tends to provoke others to the commission of immediate, physical violence. Stirring the listener to action by a heated debate, a coolly logical speech, or even a wildly emotional harangue is an acceptable practice and a constitutionally protected right. But, deliberate provocation of killing or violence—acts

to which the Georgia statute is addressed—has not enjoyed historical acceptance in this country. Even debate or speech-making, designed to move the listener to constructive, albeit loud, political action cannot survive in a community which is impotent to prevent a man from deliberately triggering physical outbursts.

An examination of the Supreme Court's opinion in *Brandenburg v. Ohio, supra,* will furnish a very adequate vehicle for illustrating the operation of the statute under attack. In footnote 1 of the Court's per curiam opinion there were set forth various phrases derogatory of negroes and Jews. According to the opinion, these phrases were clearly understandable from the sound track of a sound motion-picture film taken at a Ku Klux Klan rally in Ohio. This film had been introduced into evidence against the defendants who had staged the rally in a prosecution under the Ohio Criminal Syndicalism statute, Ohio Rev. Code ¶ 2923.13. By derivation, it is not difficult to imagine and picture the situation where any one of these phrases to be used in a direct face-to-face confrontation with an ordinary member of the class thereby degraded. The situation is not one then of mere advocacy of an idea nor the communication of thoughts. In such a circumstance the words, many of which are obviously opprobrious, and the language, much of which is clearly abusive, constitute a provocation to physical conflict. Under the laws of Georgia, as previously pointed out, they could well be found to constitute a justification for an assault by the demeaned person upon the speaker. The State of Georgia submits that the first amendment was never intended and has never been applied to negative the police power of the States to make punishable such deliberate provocations. There is simply nothing

in any majority opinion of the Supreme Court in the area of first-amendment rights which indicates that the States are helpless and powerless to proscribe what in effect amounts to a verbal assault.

The shaking of a fist by a speaker in the advocacy of an idea may under certain constructions of the first amendment be protected, symbolic free speech, but none of these theories would go so far as to say that the belligerent shaking of the fist under the nose of another person is not conduct which the States may punish. Yet, it is but a small step from the decision of the court below to a decision striking down simple assault statutes on the ground that they contravene the first amendment.

Additional support for the statute's constitutional validity can be found in the continuing vitality of the clear-and-present-danger limitation on first-amendment freedoms. *Brandenburg v. Ohio, supra.* It is possible that this limitation has by virtue of a footnote in the *Brandenburg* majority opinion been relabeled the "tendency to produce forcible action" limitation. *Brandenburg v. Ohio, supra* at 447, n. 2. In either case, the Georgia statute is within the limitation.

It is to be noted that the statute under attack does not proscribe the use of language tending to a breach of the peace; rather, it proscribes the use of such language *to and of another person and in his presence* tending to a breach of the peace. We only need to reimagine the illustrations conveyed by the *Brandenburg* decision to realize the extreme importance of this difference in testing the statute under the first amendment. Certainly, it cannot be said that the Georgia statute does anything more than proscribe language fully and completely re-

lated to its tendency to produce forcible action. Again, it is impossible to construe the Georgia statute as being applicable to the mere advocacy of an idea.

For these reasons, and in light of the foregoing discussion, the State of Georgia submits that its statute which the court below declared unconstitutional does not by its language breach protected first-amendment liberties. Provoking a fight, whether it be by "getting in the first lick" or by using abrasive language is criminal conduct. Criminal conduct per se does not enjoy first-amendment protection. While the Supreme Court has considered principally first-amendment rights in the context of political rights, the lower federal courts have had occasion to declare that the freedom-of-speech principle is inapplicable to per se criminal conduct. *United States v. Borgese, supra.* "While the first amendment provides freedom of speech, it does not guarantee or protect criminal conduct." *United States v. Smith,* 209 F.Supp. 907, 919 (E.D. Ill. 1962). The sweeping statements of these cases are not incompatible with standards enunciated by this Court.

The State of Georgia submits that provoking a fight is a common crime and that such provocations are not shrouded under the mantel of the first amendment. Provoking a blow with the fist or the retort of a pistol has never been, and should not now be, equated with provoking those mental processes which lead to a useful social and political change. The appellant submits that a careful reading of Ga. Code § 26-6303 reveals that the statute does not infringe upon constitutionally protected speech. It is simply a statute prohibiting the precipitation of unprotected, illegal physical violence. Therefore, the State submits that the statute is not overly broad,

as claimed by the appellee. There is no constitutional right to provoke and precipitate civil war, whether there be tens or hundreds of participants, or merely two individuals swinging their fists at one another.

2. A STATE STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE, AND INTERPRETED BY THE COURTS OF THE STATE AS PROHIBITING OPPROBRIOUS WORDS AND ABUSIVE LANGUAGE "LIKELY TO CAUSE A BREACH OF PEACE" OR "WHICH WOULD NATURALLY TEND TO CAUSE A BREACH OF PEACE UNDER ORDINARY CIRCUMSTANCES", IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS INTERPRETED BY THE COURTS OF THE STATE IN QUESTION.

While the constitutional cornerstones of alleged vagueness and overbreadth have been placed in close juxtaposition, the concepts represented by the two words are not necessarily allied, for a statute could employ words of precise and definite meaning to intrude upon an area substantively protected by the Constitution. On the other hand, a statute could employ vague and imprecise words raising procedural due-process questions, and still not be overly broad because of its lack of infringement upon a substantive constitutional provision.

A differentiation between the concepts of vagueness and overbreadth should be drawn in this case for two principal reasons. Firstly, the Georgia statute is neither

vague nor overly broad. Secondly, the two concepts are not mutually inclusive, and the doctrines represented should not be mingled and allowed a degree of interplay which would permit each of the diverse concepts to come in aid of the other.

Implicit in the appellee's claim of vagueness is the contention that he, as an individual of at least ordinary intelligence, cannot understand the statute, for "the concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *Landry v. Dailey,* 280 F.Supp. 938, 951 (E.D. Ill. 1968), appeal dismissed *Landry v. Boyle,* 393 U.S. 220 (1968).

The overbreadth claim necessarily rests upon a contention that the statute infringes upon a substantive right specifically granted by the Constitution. In drawing the distinctions between the legal concepts of vagueness and overbreadth, the three-judge court in *Landry, supra,* pointed out that "the concept of overbreadth . . . rests on principles of substantive due process which forbid the prohibition of certain individual freedoms." *Landry v. Dailey, supra* at 951. Having previously shown that the statute is not overly broad so as to prohibit substantively protected first-amendment exercises, the appellant now turns to the due-process claims, including the appellee's first-amendment "vagueness" claims.

The Georgia statute is plain on its face. As such, the statute does not really require judicial construction, as its meaning is clear without interpretation. In examining a statute, a court should accord it a normal and ordinary construction as indicated by the words employed by the legislative draftsmen. The standard to be used is

whether the statute gives "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 340 U.S. 612, 617 (1953). The words employed in a statute generally have the meaning ordinarily ascribed them by "men of common intelligence." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 573 (1942). For an additional detailed discussion of this general area, see Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law,* 3 Vand.L.Rev. 531, 539-43 (1950).

In disposing of the alleged due process deficiencies in the statutes involved in the now famous *Roth* and *Alberts* obscenity cases, this Court held that

> "'. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct wwhen measured by *common understanding and practices. . . .*'" *Roth v. United States,* 354 U.S. 476, 491 (1957). (Emphasis added.)

Just as the citizens of the United States were held to recognize the conduct forbidden by the obscenity statutes involved in the *Roth* and *Alberts* cases, men of common understanding know, without being told by the General Assembly of Georgia, that the expression of some thoughts under particular circumstances is highly likely to produce a black eye or a broken nose. This obvious truth has received judicial recognition and application. *Chaplinsky v. New Hampshire, supra* at 573. The Georgia statute does not forbid "conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Baggett v. Bullitt, supra.* See also *Cramp v. Board of*

Public Instruction of Orange County, Florida, 368 U.S. 278, 7 L.Ed.2d 285 (1961).

The appellant submits that the statute more than adequately meets due-process requirements and that it is not overly broad. While this may be discerned from a reading of the statute, it is unnecessary to indulge in speculation concerning its application, as numerous cases have reached the appellate courts of Georgia requiring the application of Ga. Code § 26-6303. The standard, prevailing rule of statutory construction was early applied to the language of this section. *Stevenson v. State,* 90 Ga. 456, 458 (1892). Consequently, the phrase "opprobrious words or abusive language" is to be taken in the ordinary sense conveyed by the words.

In determining the ordinary sense of words, reference to a standard, accepted dictionary has been judicially approved. *United States v. Strong,* 263 F. 789, 796 (W.D. Wash.). Thus, "abusive" is synonymous with coarse, insulting words. Webster defines "abusive" as "given to or tending to abuse". "Abuse" is by Webster defined as "vituperative words; coarse, insulting speech; abusive language; virulent condemnation; reviling." The same authoritative source defines "opprobrious" as being expressive of opprobrium (reproach, disgrace, contempt, infamy, reprobation), as attaching disgrace, as being reproachful and/or scurrilous. Opprobrious language is disgraceful, abusive, insulting, offensive, scurrilous, gross and vulgar. Thus, opprobrious has been judicially defined as meaning reproachful, scurrilous, infamous. *Behling v. State,* 110 Ga. 754, 755 (1900); *Dillard v. State,* 41 Ga. 278, 281, 282 (1871). The term "abusive and opprobrious language" contemplates words conveying contempt and insult. *Behling v. State, supra.* Similar

definitive concepts have been applied in other states. See *Peters v. State,* 51 So. 952, 953 (Ala. 1910); *State v. Pope,* 96 A. 313, 314 (Conn. 1916); *People v. Sinclair,* 149 N.Y.Supp. 54 (Gen. Sess. 1914).

It is important to note that the Georgia statute under attack does not prohibit the use of abusive language and opprobrious words. Considerably more is required in order for conduct to become punishable under the statute. "Proof of the use of opprobrious words alone is not sufficient, without showing the circumstances or in any way proving want of provocation." *Fuller v. State,* 72 Ga. 213 (1883), approved *Hardin v. State,* 114 Ga. 58 (1901). See also *Fish v. State,* 124 Ga. 416 (1905).

> "We cannot think that the legislature was aiming solely at the words, without reference to the thoughts or idea the words are intended to convey. There is not a single word in the language, however coarse, low or vulgar, that may not be and is not often used to convey proper and decent ideas, and it is a mawkish and really an indelicate and immodest sensitiveness that blushes at a word which may be used obscenely, but which the occasion and the context shows not to be so used. Words get their point and meaning almost entirely from the time, place, circumstances and intent with which they are used, and it seems to us a very unfair interpretation of this clause of the Code to say, that it is directed simply against the use of certain words which are by common consent banished from decent society. If there are any such words in our language they are very few, and as we have said, they are only obscene and vulgar accordingly as they convey obscene and vulgar ideas.
>
> "This statute does not stand upon the footing of statutes against public indecency. Its object is not

> to keep pure the public morals. It is to be found in that chapter of the Code which punishes private wrongs, and *forms a part of the same clause which makes it a penal offense to use opprobrious and abusive language to another." Dillard v. State, supra* at 281. (Emphasis added.)

While this particular appellate decision dealt with a conviction for using obscene language to a female, it is clearly expressive of the uniform judicial construction which has been placed upon the entire section insofar as it proscribes various verbal expressions.

In every prosecution involving the statute under attack, a mixed question of fact and law is whether the alleged words were likely to cause a breach of the peace. *Jackson v. State,* 14 Ga. App. 19 (1913). Further, the statutory language relating to the tendency to breach of peace has been adequately construed by the Georgia courts so as to define the situation within which the use of abusive and opprobrious language, as commonly understood, is prohibited. *Elmore v. State,* 15 Ga. App. 461 (1914); *Jackson v. State, supra.* This portion of the statute has been construed as "likely to cause a breach of peace," or, in other words, language "which would naturally tend to cause a breach of peace under ordinary circumstances." *Ibid.*

In addition to the cases already cited, the statutory prohibition has been construed and applied to particular situations in a number of reported, appellate-level decisions. *Wiggins v. State,* 17 Ga. App. 748 (1916); *Porter v. State,* 86 Ga. 362 (1896); *Meaders v. State,* 96 Ga. 299 (1895); *Ratteree v. State,* 78 Ga. 335 (1886).

The thrust of these decisions illustrates the fact that, as construed by the Georgia courts, the statute in ques-

tion is not applied to regulate speech. It is not a statute enforcing any concept within the general view of public morals. Instead, it falls within the area of those statutes designed to further the State's domestic peace-keeping function. Under the statute as construed, a person is free to utilize abusive language and opprobrious words so long as he does not utilize those words in a contextual situation where, under ordinary circumstances, the natural effect of the language would be to cause a breach of the peace. Just as one is not free to cry "fire" falsely in a crowded theater, one is not free, however naturally coarse, abusive and opprobrious he might be, to use abusive language and opprobrious words to and of another, and in the other's presence, in a situation where, under normal and natural circumstances, a breach of the peace is thereby likely to be caused.

The appellant submits that the interpretations placed upon the statute by Georgia appellate courts adequately demonstrate the narrow range within which the statute operates. It is well to emphasize that as construed no less than four distinct elements must be present in order to sustain a conviction under the section in question. Firstly, there must be abusive language or opprobrious words, as the same is commonly understood. Secondly, these words or this language must be used to or of another person. Thirdly, the remarks must be made in the immediate, direct presence of the person either to whom it is addressed or of whom it has reference. Fourthly, the entire situation in which the words are spoken must, under normal circumstances, cause the conduct of speaking so as to make this conduct likely to cause a breach of the peace. Taken together these four elements outline a pro-

scription of provocative, assaultive conduct which it is clearly within the police power of the States to prohibit.

The latest decisions of this Court continue to reaffirm the proposition that first-amendment rights are related to political activities and not to mere criminal conduct. "Speech and press are, of course, to be free, so that *public matters can be discussed* with impunity." *Gregory v. Chicago*, 394 U.S. 111, 125 (1969), separate opinion. The Court recognizes that men's homes can be protected "from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Gregory v. Chicago, supra* at 125 (JJ. Black and Douglas concurring). If the minds of men may be protected from the communication of "fears of the unknown", the appellant submits that there can be no question that overt and assertive offers of violence (constituting known fears) may be prohibited.

In dealing with Ohio's criminal syndicalism statute, the Supreme Court noted that the statute failed to distinguish between mere teaching of violence and "preparing a group for violent action and steeling it to such action." *Brandenburg v. Ohio, supra* at 448. In striking down the statute, the Court said that there was no narrowing State construction of the definition of the crime "in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 447. The *Brandenburg* Court said, in effect, that a statute may not forbid mere advocacy. That proposition is unquestioned. The Court did not leave the matter there. It said, at least inferentially, that a statute prohibiting speech which incites "to imminent lawless action" is permissible. The Georgia statute prohibits abusive and opprobrious speech

"tending to cause a breach of the peace". There is neither logical nor legal difference between the concepts represented by the words "tending to cause a breach of the peace" and "incitement to imminent lawless action".

The most recent case known to counsel involving the speech-violence concept—which is the heart of this case—is a prosecution undertaken in the District of Columbia in which the defendant was charged with using "profane * * * words under circumstances tending to breach of peace did congregate * * * and refuse to move on * * *." *Williams v. District of Columbia,* 419 F.2d 638 (D.C. Cir. 1969). The United States Court of Appeals for the District of Columbia Circuit, in reversing *en banc* a panel decision, held that the section of the District of Columbia Code "would not be invalid if the statutory prohibition against profane or obscene language in public were interpreted to require an additional element that the language be spoken in circumstances which *threaten a breach of the peace.* And for these purposes a breach of the peace is threatened either because the language creates a substantial risk of provoking violence, or because it is, under 'contemporary community standards' so grossly offensive to members of the public who actually overhear it as to amount to a nuisance." *Williams v. D. C., supra* at 646.

Although the accusation in the *Williams* case alleged that the words were spoken under circumstances tending to cause a breach of the peace, unfortunately, the District of Columbia Code did not include "tending to cause a breach of the peace" as an element of the offense. The draftsmen of Georgia's statute specifically included the words "tending to cause a breach of the peace" as an element of the Georgia offense.

Georgia's statute does not ensnare the political speaker. It simply and adequately prohibits the deliberate provocation of a fight. It is a simple criminal statute which, while it deals with verbal conduct, has no other reasonable nexus with the first amendment.

CONCLUSION

For each of the foregoing three reasons, the appellant submits that the decision of the court below holding Ga. Code § 26-6303 (1933) unconstitutionally vague and overbroad was in error and should be reversed.

It is submitted that the question presented by this appeal is substantial and is of public importance.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28274

JOHNNY C. WILSON,

Petitioner-Appellee,

versus

MILLARD GOODING, Warden, Richmond County Public Works Camp, Richmond County, Georgia,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(August 19, 1970)

Before SIMPSON, MORGAN, and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: Petitioner-Appellee Wilson was indicted and convicted in Superior Court of Fulton County, Georgia, on two counts of assault and

battery, and two counts of using opprobrious and abusive language,[1] the latter in violation of Georgia Code § 26-6303.[2] Appellee filed a petition for a writ of habeas corpus in the federal district court, pursuant to 28 U.S.C. § 2254. Among other claims, he alleged that § 26-6303 was unconstitutional on its face under the First and Fourteenth Amendments because of its vagueness and overbreadth. The district court, in an order dated March 4, 1969, dismissed all of appellee's habeas corpus claims with the exception of the question involving § 26-6303, it appearing that state remedies had not been exhausted. The question of the facial constitutionality of § 26-6303, however, had previously been before the Georgia Supreme Court,[3]

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[1]On Counts 1 and 2, appellee received consecutive 12 month sentences for committing assault and battery on each of two police officers. He received an additional sentence of 12 months on counts 3 and 4 for using opprobrious and abusive language to each officer. The sentence on count 4 was to run concurrently with that of count 3, and thus appellee's total prison term for the state prosecution was to be 36 months.

[2]§ 26-6303 of the Code of Georgia (1933) provides that:

> "Any person who shall, without provocation, use to or of another, and in his presence, or by telephone, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner use obscene and vulgar or profane language in the presence of, or by telephone to, a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character shall be guilty of a misdemeanor."

[3]Wilson v. State, 223 Ga. 531, ____ S.E.2d ____ (1967).

obviating the need to exhaust state remedies on that matter.[4]

In a subsequent order entered on July 8, 1969, the district court held § 26-6303 unconstitutional on its face and ordered the release of appellee from that portion of his confinement attributable to his conviction under the statute. *Wilson v. Gooding*, 303 F.Supp. 952 (N.D.Ga. 1969). Appellants, Millard Gooding and the State of Georgia, in seeking reversal of this judgment and order, raise the following two issues:

I. Did the district court err by failing to request a three-judge court pursuant to 28 U.S.C. § 2281 when an application for a writ of habeas corpus raises a substantial question of the constitutionality of a state statute?

II. Did the district court err in holding § 26-6303 unconstitutionally vague and overbroad on its face and as interpreted by the Georgia courts?

I.

The first issue involves a possible conflict between habeas corpus and three-judge court jurisdiction under § 2281.[5] It is well recognized that there are four es-

[4]The district court's order called for briefs to be submitted on the constitutional issue, and at this point the State of Georgia entered the case as amicus curiae.

[5] "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application

sential requirements for the application of § 2281: "(1) a state statute must be challenged; (2) a state officer or local officer performing a state function must be a party defendant; (3) injunctive relief must be sought; (4) it must be claimed that the statute is contrary to the Constitution." *Gilhool v. Chairman & Com'rs, Philadelphia Co. Bd. of Elections*, 306 F.Supp. 1202, 1205 n.2 (E.D.Pa. 1969), *aff'd*, 397 U.S. 147 (1970); C. Wright, Federal Courts § 50, at 189 (2d ed. 1970). See also *Hall v. Garson*, ... F.2d ....., ... (5th Cir. 1970, No. 29690, July 22, 1970, at 25). Although there is no problem in the case sub judice with requirements (1), (2) and (4), there was no prayer for injunctive relief. Appellants, however, argue that in substance, if not in form, all four requisites have been met because the effect of holding § 26-6303 unconstitutional was to enjoin a state officer from enforcing a state statute.

In sum, appellants are calling for a liberal construction of § 2281. The Supreme Court, however, has repeatedly warned that the three-judge court legislation is not "a measure of broad social policy to be construed with great liberality," but rather "an enactment technical in the strict sense of the word and to be applied as such." *Phillips v. United States*, 312 U.S. 246, 251 (1941). See *Mitchell v. Donovan*, ... U.S. ..... (1970) [38 U.S.L.W. 4514, June 15, 1970]; *Hall v. Garson, supra*. The Court has also taken the position that under the analogous provisions of 28 U.S.C. § 2282, dealing with federal statutes, when plaintiffs merely attack the validity of legislation without also ". . . affirmatively

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therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U.S.C.A. § 2281

[seeking] to interdict the operation of a statutory scheme," a single district judge alone must hear the case. *Flemming v. Nestor*, 363 U.S. 603, 607 (1960). See *Mitchell v. Donovan, supra; Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 153-55 (1963).[6]

The specific question raised by appellants is whether a single district court judge has jurisdiction to pass upon the constitutionality of a state statute in a habeas corpus proceeding in view of the requirement for a three-judge court under § 2281. To our knowledge, there has been no discussion of this particular issue beyond the district court level. The majority of lower courts, however, have followed the view that § 2281 has no relation to habeas corpus proceedings and thus that a single judge is sufficient. *United States v. York*, 281 F.Supp. 8, 12 (D.C. Conn. 1968); *McCarrol v. Faust*, 278 F. Supp. 448, 450 (E.D.La. 1968); *United States v. Warden of Wallkill Prison*, 246 F.Supp. 72, 92 n.16 (S.D.N.Y. 1965), *aff'd*, 355 F.2d 208 (2d Cir. 1966); *United States v. Commonwealth of Pennsylvania*, 214 F.Supp. 913 (W.D.Pa. 1963); *United States v. Warden of Clinton Prison*, 29 F.Supp. 486, 489 (N.D.N.Y. 1939), *aff'd* 108 F.2d 861 (2d Cir. 1940), *cert. denied*, 309 U.S. 661 (1940).[7]

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[6] In these cases the Court refused to equate suits for a declaratory judgment with suits for injunctive relief. In the case at bar, no injunction was sought or granted barring prosecution of other persons by Georgia authorities under Georgia Code § 26-6303.

[7] Appellants assert that most of these cases rely on the *Clinton* case for authority, even though it merely indicates that "a single District Court Judge *seems* to have jurisdiction." 29 F.Supp. at 489 (emphasis added). However, the more recent opinions cited above are very definite in stating that a three-judge court is not necessary when the constitutionality of a state statute is

The question we face is actually a matter of balancing values, for we must make a choice between judicial economy and federal-state comity. We recognize that the passage of § 2281 was motivated by "the indignity and injustice which it was felt was being done to the states in having their solemn legislative acts, and the efforts of state officers to enforce them, impeded, perhaps frustrated, by the interlocutory fiat of a single judge. . . ." Hutcheson, *A Case for Three Judges,* 47 Harv. L. Rev. 795, 804 (1934). However, a particular state prisoner, such as appellee Wilson, in seeking discharge from prison on the grounds of conviction under an unconstitutional statute, does not threaten to frustrate the operation or existence of state government. Despite the many applications for habeas corpus, it is very seldom that a federal district judge orders the release of a prisoner the state has convicted. C. Wright, *supra.* § 50, at 217. On the other hand, the number of applications is increasing rapidly. To require a three-judge court for every case similar to the instant proceedings would place an unacceptable burden on the federal judiciary.[8]

The convening of a three-judge court is an extraordinary procedure which in itself imposes a burden on our federal court system. The summoning of another district judge and a circuit court judge may often result in

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attacked on a petition for federal habeas corpus. This is indicative of the trend that these lower federal courts have followed.

[8]The Judicial Conference of the United States in 1959 endorsed a proposal calling for a three-judge court for habeas corpus applications, but it retreated from this position in 1965 in realization of the troublesome burden that would result. C. Wright, *supra,* § 53, at 218. See Ann. Rep. of the Judicial Conference of the United States, 1965, at 83.

a delay in matters needing immediate attention. *Allen v. State Board of Elections,* 393 U.S. 544, 561 (1969); *Swift & Co. v. Wickham,* 382 U.S. 111, 128 (1965). The direct appeal provision deprives the Supreme Court of often crucial adjudications by the courts of appeals, and thus the Court has called for utmost caution in any attempts at extension of the procedure. *Allen v. State Board of Elections, supra,* at 562; *Swift & Co. v. Wickham, supra; Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.,* 292 U.S. 386, 391 (1934).

After considerable reflection, it is our opinion that the district court's assumption of habeas corpus jurisdiction in the case sub judice should be upheld. Appellants' proposed liberal construction of § 2281 would turn the three-judge court into a habeas corpus panel. In the interest of judicial economy, a strict construction is necessary and thus there is no § 2281 jurisdiction.

II.

After careful independent examination of the constitutionality of Georgia Code § 26-6303 and its interpretation by the Georgia courts, we find that the opinion-order of the district court, *Wilson v. Gooding,* 303 F.Supp. 952 (N.D.Ga. 1969), carefully and fully delineates the reasons for holding § 26-6303 unconstitutionally vague and overbroad. We agree with the well reasoned opinion of the district court and its judgment is AFFIRMED.

APPENDIX B
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY C. WILSON

vs.

MILLARD GOODING, Warden of the Richmond County, Georgia, Public Works Camp

CIVIL ACTION NUMBER 12511

In this writ of habeas corpus petitioner seeks to set aside his conviction on a number of grounds. The Court, in an order dated March 4, 1969, concluded that petitioner had not exhausted his available state remedies as to contentions raised in paragraphs 6b, 7, 8, and 9 of the writ. The Court concluded that petitioner had exhausted his remedies as to the contention raised in paragraphs 5 and 6(a), attacking his conviction on the grounds of the alleged unconstitutionality of Georgia Code §26-6303. The Court also concluded that petitioner's failure to utilize a direct appeal to the United States Supreme Court under 28 U.S.C. §1257 did not constitute a bar to this proceeding. Accordingly, this order will not deal with the alleged unconstitutional application of this statute nor any of the other points raised in the writ, except for the facial unconstitutionality of Georgia Code §26-6303.

Georgia Code §26-6303 provides in relevant part:

> Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.

The question of constitutionality of this statute is exceedingly complex and difficult. None of the reported cases that have come to this Court's attention have dealt with the precise issues presented herein, yet many cases have dealt with at least some aspects of the instant statute. First Amendment rights have assumed a protected place in our jurisprudence. Great care must be taken in this area to assure that vague or overbroad laws do not infringe upon these rights. See, *e.g.*, Ashton v. Kentucky, 384 U.S. 195 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965). Since speech is normally intended to change the opinions or reinforce the opinions of others, problems arise as to the extent to which mere speech may be curbed when it provokes others into action. The cases reflect the view that peaceful expression of even unpopular views is permitted and even encouraged.

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . .

Terminiello v. Chicago, 337 U.S. 1, 4-5 (1948). In a recent decision the Supreme Court has taken a further step in elaborating upon the above language.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or pro-

> scribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing lawless action and is likely to incite or produce such action. As was said in Noto v. United States, 367 U.S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. See also Herndon v. Lowry, 301 U.S. 242, 259-261 (1937); Bond v. Floyd, 385 U.S. 116, 134 (1966).

This decision in Brandenburg v. State of Ohio, 37 U.S.L.W. 4525 (June 9, 1969) logically followed from the Court's earlier decisions in Yates v. United States, 354 U.S. 298 (1957); DeJonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931). But a speaker passes the bounds of argument and persuasion and undertakes incitement to riot. See, *e.g.*, Feiner v. New York, 340 U.S. 315 at 321 (1950). The above distinction, while easily stated, is not so easily applied to a given factual situation. What is clear, however, is the fact that the Supreme Court will not allow intrusions into this protected area.

> For standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

N.A.A.C.P. v. Button, 371 U.S. 415 at 432-33 (1963). Thus, in *Ashton v. Kentucky, supra,* the Court struck down a statute prohibiting ". . . any writing calculated to create disturbances of the peace. . . ." In Terminiello v. Chicago, 337 U.S. 1 (1949), the Court struck down an ordinance forbidding any "breach of the peace" where

the trial judge instructed the jury that any misbehavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" violated the ordinance. Clearly, a statute may not involve "calculations as to the boiling point of a particular person or a particular group," but must involve "an appraisal of the nature of the commence *per se*." *Ashton v. Kentucky, supra* at 200. Numerous other decisions have overturned breach of the peace statutes and related statute where the offense was improperly or imprecisely defined. See, *e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Hunter v. Allen, 286 F. Supp. 830 (N.D.Ga. 1968); University Committee to End The War In Viet Nam v. Gunn, 289 F. Supp. 469 (W.D. Tex. 1968); Baker v. Bindner, 274 F. Supp. 658 (W.D.Ky. 1967); Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967).[1]

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[1]In *Carmichael, supra,* the Court noted:

> . . . [I]t takes no elaboration to demonstrate that the term "vulgar" in connection with "language", and the use of the term "tending to disturb the good order, morals, . . . or dignity of the City" leaves "the executive and judicial branches too wide a discretion in the application" of the law. It too readily permits them to make a crime out of what is protected activity.

Id. at 998-99.

In *Hunter v. Allen, supra,* while commenting upon Atlanta's disorderly conduct statute, the Court observed:

> In short, the standards are overwhelmingly subjective. What is an "angry threat"? What is "abusive" conduct? What is "roughly crowding"? What is a "dangerous manner"? The reaction of some unknown third party could determine the guilt or innocence of the accused.

Id. at 836.

Having generalized as to the legal background in this area, the Court is now faced with a decision as to the constitutionality of Georgia Code §26-6303. Defendant argues that the phrases "opprobrious words" and "abusive language" having a well defined meaning in the Georgia law and are not so broad as to impinge upon protected areas. In construing this code section the Courts have held that the words of the enactment are to be taken in their ordinary signification. Stevenson v. State, 90 Ga. 456 (1892). The Georgia Courts have definitely established grimaces or facial expressions of contempt do not constitute "opprobrious words or abusive language." Behling v. State, 110 Ga. 754 (1900). In Fisk v. State, 124 Ga. 416 (1905), the Court reversed a trial judge's instructions that as a matter of law certain words were opprobrious and abusive, stating that this as well as whether it was calculated to cause a breach of the peace were questions for the jury. This holding appears to be contrary to the holding of the Georgia court in the instant case that the words used by the petitioner were opprobrious and abusive per se. Again in Jackson v. State, 14 Ga. App. 19 (1913), the court stated that this was a question for the jury, but again failed to define these terms. The decision in Dillard v. State, 41 Ga. 278 (1870) deals only with the provision as to the use of obscene or vulgar language in the presence of a female. Thus, in the decisions brought to this Court's attention, no meaningful attempt has been made to limit or properly define these terms. Some courts have approved reference to a standard dictionary to define statutory terms. *E.g.*, United States v. String, 263 F. 789, 796 (W.D. Wash.) According to Webster's New International Dictionary (2d Ed. 1941), opprobrious means: "Expressive of opprobrium; attaching disgrace;

reproachful; scurrilous . . ." Synonyms include "disgraceful, abusive, insulting, offensive." The same work lists as synonyms for insulting, the terms "insolent and offensive." Thus, in the dictionary sense of these phrases, they both include the words that are offensive, thus arguably encroaching upon the mandates of *Brandenburg, supra, Ashton, supra,* and *Terminiello, supra.* There is dicta in Cantwell v. Connecticut, 310 U.S. 296 (1940) that certain epithets, profane and indecent in nature, would not be protected. The case of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) suggests that "fighting words" may result in punishment.[2] Moreover, this Court does not see any policy reasons for upholding the right of a person to use the type of language expressed by this petitioner. It strains the concept of freedom of speech out of proportion when it is argued that such language is and should be protected. However, this consideration is really not relevant to the present inquiry, except to suggest that a narrowly and precisely defined statute could have reached this sort of speech. The fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application. The State argues that the statute is saved by the adding requirement of "tending to breach the peace." This is a persuasive argument until one reads the decision in *Ashton v. Kentucky, supra,* wherein the Court states in reference to *Edwards v. South Carolina, supra,* and *Cox v. Louisiana, supra:*

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[2]However, the higher courts have thus far failed to provide a precise standard themselves. Such expression is needed if the lower courts are to be continually called upon to inquire into the validity of similar state statutes and local ordinances. Cantwell v. Connecticut, 310 U.S. 296 (1940) gives the most likely basis, insofar as it is still valid.

> These decisions recognize that to make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility.

Id. at 200. Moreover in *Cox v. Louisiana, supra,* at 551, the Court struck down as unconstitutionally vague and broad a statute including as an element the congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace, or under circumstances such that a breach of the peace may be occasioned." As construed by the Georgia courts, especially in the instant case, the Georgia provision as to breach of the peace is even broader than the Louisiana statute.

Thus, the Court must conclude that Georgia Code 26-6303 is unconstitutionally vague and broad, and the conviction therefor is set aside.

That portion of defendant's confinement attributable to a conviction under this statute must necessarily fall.

IT IS SO ORDERED.

This the 7th day of July, 1969.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

APPENDIX C

26-1409. (103 P. C.) *Opprobrious words as defense; question for jury.* — On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury. (Cobb, 841.)

26-6303. (387 P. C.) *Using abusive or obscene language.* — Any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence of a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character, shall be guilty of a misdemeanor. (Acts 1865-6, p. 233; 1872, p. 9; 1875, p. 25; 1890-1, p. 83; 1919, p. 103.)

APPENDIX D

(Filed Court of Appeals, New Orleans, September 3, 1970.)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28274

JOHNNY C. WILSON,

Petitioner-Appellee,

v.

MILLARD GOODING, Warden,
Richmond County Public Works Camp,
Richmond County, Georgia,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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NOTICE OF APPEAL

I. Notice is hereby given that Millard Gooding, Warden, Richmond County Public Works Camp, the respondent-appellant above-named, hereby appeals to the Supreme Court of the United States from the judg-

ment affirming a judgment of the United States District Court declaring unconstitutional a statute of the State of Georgia entered in this action on August 19, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

II. The following question is presented by this appeal: Whether a state statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace is unconstitutional for vagueness and overbreadth.

/s/ ARTHUR K. BOLTON

ARTHUR K. BOLTON
Attorney General

/s/ HAROLD N. HILL, JR.

HAROLD N. HILL, JR.
Executive Assistant Attorney General

/s/ MARION O. GORDON

MARION O. GORDON
Assistant Attorney General

/s/ COURTNEY WILDER STANTON

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PROOF OF SERVICE

I, Marion O. Gordon, one of the attorneys for the Respondent-Appellant, the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 1st day of September, 1970, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On Johnny C. Wilson, the Petitioner-Appellee, by mailing three (3) copies in a duly-addressed envelope, with first-class postage prepaid, to his attorneys of record, as follows:

Mr. Howard Moore, Jr., and Mr. Peter Rindskopf, Moore, Alexander & Rindskopf, Suite 1154, Citizens Trust Company Bank Building, 75 Piedmont Avenue, N. E., Atlanta, Georgia 30303.

/s/ MARION O. GORDON

MARION O. GORDON

P. O. Address:

132 Judicial Bldg.
40 Capitol Square
Atlanta, Ga. 30334

CERTIFICATE OF SERVICE

I, Marion O. Gordon, one of the Attorneys for the Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of October, 1970, I served a copy of the foregoing Jurisdictional Statement on the Appellant by mailing copies of the same in duly addressed envelopes with postage prepaid to his counsel HOWARD MOORE, JR., and PETER E. RINDSKOPF, Suite 1154, Citizens Trust Company Bank Building, 75 Piedmont Avenue, N.E., Atlanta, Georgia 30303.

MARION O. GORDON
Of Counsel for Appellee